No. 14,550

United States Court of Appeals

For the Ninth Circuit

WONG KAM WO and WONG KAM YIN,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,
Appellee.

BRIEF FOR APPELLANTS.

W. Y. CHAR,
JACKSON & HERTOGS,
580 Washington Street, San Francisco 11, California,
Attorneys for Appellants.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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JURISDICTIONAL STATEMENT.

Appellants, Wong Kam Wo and Wong Kam Yin, filed in the United States District Court for the District of Hawaii, on March 11, 1952, a complaint seeking a declaratory judgment of United States citizenship pursuant to the provisions of Section 503 of the Nationality Act of 1940. (54 Stat. 1171; 8 USC 903.)

The District Court denied plaintiffs' petition for a declaratory judgment of citizenship (Supp. T. 4), and plaintiffs appealed. (Supp. T. 6.) Jurisdiction of this Court to review the District Court's decision is conferred by 28 USC 1291 and 1292.

STATUTES INVOLVED.

Section 503 of the Nationality Act of 1940 (8 U.S. C.A. 903) provides, in so far as pertinent here:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or Agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

Section 1993 of the Revised Statutes of the United States (Acts of April 14, 1802 and February 10, 1855 (before amended by Act of May 24, 1934, Section 1), 8 U.S.C.A. 6) reads:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Section 4 of the Hawaii Organic Act (31 Stat. 141; 48 U.S.C. 494), insofar as pertinent here, reads as follows:

> "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are declared to be

citizens of the United States and citizens of the Territory of Hawaii."

Section 100 of the same Organic Act provided:

"That for the purpose of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii * * *." (31 Stat. 141; formerly 8 USC 385.)

STATEMENT OF THE CASE.

Appellants, natives of China, claim to have acquired United States citizenship at the time of their births on November 16, 1920 and December 3, 1922 under the provisions of Section 1993, Revised Statutes of the United States, as the lawful blood children of a United States citizen father who resided in the United States prior to their birth. The District Court found that the appellants were born on the dates given and that the appellants, and each of them, are the true and lawful blood sons of Wong Tin, whose United States citizenship is conceded. The Court found that Wong Tin, also known as Wong Kwai Hoy, was born in Honolulu, Republic of Hawaii, on November 25, 1893; that the said Wong Tin departed from Honolulu, Republic of Hawaii on October 9, 1897 and did not return to Honolulu, Territory of Hawaii until 1923, a date subsequent to the birth of both appellants.

From the foregoing facts, the District Court concluded that the appellants did not acquire United States citizenship or nationality at birth, since their father had not resided in the United States prior to their birth. Following such a conclusion, a judgment declaring the appellants not to be United States nationals for the foregoing reason was filed and entered on August 15, 1955. It is from the foregoing conclusion of law and judgment that this appeal follows.

SPECIFICATION OF ERROR.

That the District Court erred in concluding that the plaintiffs, Wong Kam Wo and Wong Kam Yin, did not acquire United States citizenship or nationality at birth under the provisions of Section 1993, Revised Statutes of the United States.

ARGUMENT.

The Hawaiian Islands were acquired by the United States pursuant to the terms of a treaty with the Republic of Hawaii, and by virtue of a joint resolution of Congress, approved July 7, 1898 (30 Stat. 750) accepting incorporation of the Hawaiian Islands as part of this nation. The sovereignty of the Hawaiian Islands was formally transferred to the United States on August 12, 1898. On April 30, 1900, Congress enacted a law (31 Stat. 141) which is normally referred to as the Hawaii Organic Act. Section 4 of

that Act provided that all persons who were citizens of the Republic of Hawaii on August 12, 1898 are declared to be citizens of the United States. Section 5 of the same Act provided that the Constitution of the United States shall have the same force and effect within the Territory of Hawaii as elsewhere in the United States.

Prior to annexation, Section 1 of Article 17 of the Hawaiian Constitution provided that:—

> "All persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic are citizens thereof."

The Court properly found that Wong Tin, father of the appellants, acquired United States citizenship on April 30, 1900. (23 Op. Atty. Gen. 345; 23 Op. Atty. Gen. 352; *U. S. v. Dang New Wan Lun,* 9 Cir., 88 F2d 88, 89.)

Since the District Court found that Wong Tin is a United States citizen, and that the appellants are his lawful blood children, the question of the citizenship status of the appellants depends upon the determination as to whether Wong Tin "resided in the United States" prior to the birth of each appellant. *Weedin v. Chin Bow,* 274 U.S. 657.

Under Section 100 of the Enabling Act, Congress saw fit to specifically provide—

> "That for the purpose of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States * * *."

In *United States v. Wong Kim Ark,* 169 U.S. 649, 654, 672, 702-703 the Court stated:

> "By the Constitution of the United States, Congress was empowered 'to establish an uniform rule of naturalization.' In the exercise of this power, Congress, by successive acts, beginning with the act entitled 'An Act to Establish an Uniform Rule of Naturalization,' passed at the second session of the first Congress under the Constitution, has made provision for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time 'within the limits and under the jurisdiction of the United States,' and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, 'dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization.' Third. Foreign-born children of American citizens, coming within the definitions prescribed by Congress. Acts of March 26, 1790 (1 Stat. at L. 103, chap. 3); January 27, 1795 (1 Stat. at L. 414, chap. 20); June 18, 1798 (1 Stat. at L. 566, chap. 5); April 14, 1802 (2 Stat. at L. 153, chap. 28); March 26, 1804 (2 Stat. at L. 292, chap. 47); February 10, 1855 (10 Stat. at L. 604, chap. 71); Rev. Stat. Sections 2165, 2172, 1993."
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> * * * * * * *
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> "The constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States.' Amend. art. 14. In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.

* * * * * * *

"The fourteenth amendment of the constitution, in the declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,' contemplates two sources of citizenship, and two only—birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory, *or by authority of congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens,* or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization act." (Italics inserted.)

Also compare:

Zimmer v. Acheson, 10 Cir., 191 F2d 209, 211.

The civil rights and political status of native inhabitants of Hawaii are to be determined by the Acts of Congress. In the instant matter, Wong Tin acquired United States citizenship through collective naturalization at the time of annexation of the Territory of Hawaii. In addition, at the time Congress saw fit to specify the civil rights and political status of those then residing in Hawaii, it deemed it appropriate to specifically provide that "residence in the Hawaiian Islands prior to the taking effect" of such annexation "shall be deemed equivalent to residence in the United States." For these reasons, it is believed that the decision of the Court below is erroneous; that Wong Tin, father of these appellants, had residence in the United States within the meaning of Section 1994, Revised Statutes of the United States, prior to the birth of the appellants herein. It is believed that the statute is clear and that the rights claimed by these appellants were unjustly denied upon an improper construction of the law.

In addition to the reasons cited above, we would like to invite the Court's attention to executive construction in the interpretation of the language of the statute, even though it is realized that such executive decisions are not binding upon the Court.

The Supreme Court of the United States stated in the case of *U. S. v. Cerecedo Hermanos y Compania,* 52 L. Ed. 821, 822:

> "We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution."

Also:

Bowles v. Seminole Rock & Sand Co., 89 L. Ed. 1700, 1702;

Brewster v. Gage, 74 L. Ed. 457, 462.

It was stated by the Court of Appeals, 2nd Circuit, in the case of *North American Utility Securities Corp. v. Posen,* 176 F2d 194, at page 197:

> "An administrative interpretation which runs counter to a legislative enactment, is, of course, of no significance; but where the meaning of a statutory provision is not clear, the interpretation put upon it by those charged with the duty of administering the Act is entitled to great weight."

The Court of Appeals for the 7th Circuit expressed the same view in the case of *Bowles v. Mannie & Co.,* 155 F. 129, wherein the Court stated:

> "Be that as it may be, we must, however, be mindful of the admonition of the courts that the construction given to a statute (regulation) by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons, U. S. v. Moore, 95 U. S. 760, 763, 24 L. Ed. 558, and that the administrative interpretation is of controlling weight unless plainly erroneous or inconsistent with the regulations."

This Honorable Court expressed the same view in the case of *Ada County v. Oregon Short Line R. Co.,* 95 F2d 669, 671, i.e.:

> "* * * the rule is that an interpretation of a statute by an agency charged with enforcement thereof is entitled to consideration and weight."

Also see:

Acheson v. Yee King Gee, 184 F2d 382;

Queensboro Farms Products v. Wickard, 137 F2d 969;

U. S. v. Moskowitz, 170 F2d 870, 873;

N. L. R. B. v. Medo Photo Supply Corp., 135 F2d 279, 281, affirmed 88 L. Ed. 1007.

Normally, the Immigration and Naturalization Service is the governmental agency charged with the determination of United States citizenship as well as admissibility. Pursuant to the provisions of 8 C.F.R. 6.1(g), the Board of Immigration Appeals has published certain precedent decisions which are binding on all officers and employees of the Immigration and Naturalization Service, except as they may be modified or overruled by the Board or the Attorney General of the United States.

When considering a case where the facts were identical to the issues presented in the instant case, the Board of Immigration Appeals in the *Matter of L. G. J. and C.I.P.,* 3 I&N Dec. 206, 207, 208, held:

> "S—— could not have acquired citizenship by Revised Statutes 1993 unless his father had 'resided in the United States' prior to the birth of S——. Weedin v. Chin Bow, 274 U.S. 657. The Central Office rules that C—— did not begin to reside in the United States until many years after the birth of S—— and, therefore, concludes that Revised Statutes 1993 did not vest citizenship in S——. With this we disagree. We believe that C——'s residence in Hawaii from 1893 to 1897 satisfied the residence requirements of Revised Statutes 1993, although the United States did not

annex Hawaii until August 1898 and although Hawaii was not incorporated as a territory until April 1900. Section 100 of the Act of April 30, 1900, provided:

> That for the purpose of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii. * * *

Thus, for purposes of naturalization, residence in the Hawaiian Islands prior to the 1900 statute was made equivalent to residence in the United States. Revised Statutes 1993 was also a naturalization statute. It was enacted pursuant to the power conferred on Congress by the Constitution, article I, section 8, 'to establish an uniform rule of naturalization.' See Minor v. Happersett, 88 U.S. 162, 168 (1874); United States v. Wong Kim Ark, 169 U.S. 647, 672, 702 (1898). Section 100 of the 1900 act made residence in Hawaii prior to 1900 equivalent to residence in the United States for purposes of judicial naturalization. We think that such residence should be regarded as residence in the United States within the meaning of Revised Statutes 1993, which, as we have seen, is a naturalization statute.

We find, therefore, that S—— acquired citizenship at birth under Revised Statutes 1993. * * *"

A similar decision was made by the Regional Commissioner of the Immigration and Naturalization Service at San Pedro, California, in the case of *Lum Po Chu, et al.,* A8915206, 207, 208 & 209, decided in January, 1956.

It is submitted that the well-established administrative rule, which has been consistently followed over a period of years by the executive department charged with the enforcement of laws relating to aliens and citizens, is entitled to substantial weight in determining the claim of United States citizenship of the appellants herein.

CONCLUSION.

The judgment of the District Court, holding that the appellants are not United States nationals for the reason that their father, Wong Tin, did not reside in the United States prior to their birth, is contrary to the expressed provisions of statutory legislation. It must be concluded that the father had residence in the United States prior to the birth of the appellants within the contemplation of Section 1993 of the Revised Statutes.

Wherefore, appellants pray that the judgment of the District Court be reversed and that a judgment of United States citizenship be entered.

Dated, San Francisco, California,
March 2, 1956.

Respectfully submitted,
W. Y. Char,
Jackson & Hertogs,
By Joseph S. Hertogs,
Attorneys for Appellants.